FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. 2677

ALBERT G. GLASS,

Petitioner

—v.—

PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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ALBERT G. GLASS, your petitioner, prays that a writ of certiorari issue to review a judgment of the Court of Appeals of the State of New York (Appendix A, *infra*), affirming a judgment of the Appellate Division of the Supreme Court of the State of New York, which affirmed a judgment of an Extraordinary Special and Trial Term of the Supreme Court, Suffolk County, convicting petitioner of offering and giving bribes and of conspiracy for the perversion and obstruction of justice and of the due administration of the laws. A stay of the judgment pending the determination of this petition was granted May 10, 1960 by Hon. Stanley M. Fuld, an Associate Judge of the Court of Appeals.

Opinions Below

No opinions were delivered by the New York courts upon the rendering of the judgment.*

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on April 28, 1960 (Appendix A, *infra*).

The remittitur of the Court of Appeals was amended by order of that Court (Appendix B, *infra*) dated May 19, 1960 to add the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the denial of the motions of the defendant Glass made during trial for a mistrial and a severance upon the ground that he was then unable to testify in his own defense because of his physical condition violated his rights to due process of law and the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. This Court held that the rights of the defendant Glass under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

The additional ground asserted herein that petitioner was deprived of a fair trial in violation of the XIVth

---

* An opinion was rendered by the Appellate Division in a collateral proceeding, *Glass* v. *Markewich*, 6 App. Div. (2d) 793 (Appendix D, *infra*).

Amendment by the prejudicial conduct and remarks of the Trial Court publicized in the local newspapers and on the radio was raised in the Trial Court by a motion for a mistrial (R. 1600, 1610) and in Pt. III of the brief submitted to the Court of Appeals of the State of New York. Present counsel who recently substituted for counsel for petitioner in the New York Court of Appeals were precluded from moving to amend remittitur of the New York Court of Appeals since the Court does not reconvene for such motions until October 1960.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1257(3).

Questions Presented

1. Does the Fourteenth Amendment permit a State to try a defendant in a criminal case over his objection at a time when, although he wishes to testify in his own defense, he is then unable to do so due to grave illness except at risk to his life, as certified without contradiction by doctors appointed by the trial court?

2. Was petitioner's right to a fair trial guaranteed by the due process clause of the XIVth Amendment violated by prejudicial conduct and remarks by the Trial Court denouncing petitioner in the presence of the local press and with knowledge that his conduct and remarks would be, and in fact were, publicized and likely to be read by the jury?

Statute and Constitutional Provision Involved

Code of Criminal Procedure (McKinney's Consolidated Laws of New York, Book 66, Part 2) *Sec. 393. Defendant as witness.*

> "The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him."

New York State Constitution (McKinney's Consolidated Laws of New York, Book 2, Part 2) *Article 13, Sec. 4. Person Bribed or Offering Bribe May Testify.*

> "Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor."

AMENDMENT XIV

> "Section 1. * * * ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The judgment of conviction was entered against petitioner on November 26, 1958. He was found guilty on June 5, 1958 by a jury, after it had deliberated for three days, upon ten counts of an indictment. Also convicted was a co-defendant John A. Britting.

Britting was the Deputy County Treasurer of Suffolk County, and the indictment had to do with the purchase by

petitioner, who was in the real estate business, from the office of the County Treasurer, of certain properties previously acquired by the County for unpaid taxes, and the later participation by Britting in the profits resulting from subsequent resales thereof. The indictment also named as defendants Britting's wife and petitioner's mother, neither of whom was tried, their cases being severed, and dismissed following the conviction of the men.

Each of the nine substantive counts (R. 47-50; 52-57; 59-60)* of which petitioner was convicted charged that he offered and gave a bribe to Britting with the intent to influence Britting in respect of his official acts, viz. to issue to petitioner only, and to no other person, a deed to certain real property together with the bill of the amount required to be paid by law to the Treasurer for such property, in violation of Penal Law, Sec. 1822 (Appendix C, *infra*). The conspiracy count (R. 7-23) charged a conspiracy for the perversion and obstruction of justice and of the due administration of the laws in connection with the sale by the County Treasurer of these properties in that Britting would reserve such lands for petitioner alone, in violation of Penal Law, Sec. 580(6) (Appendix C, *infra*).

Petitioner's Inability to Testify in His Own Behalf

On May 13, 1958, during the presentation of the prosecution's case, petitioner moved for a mistrial and a severance, upon the ground that the physical condition of petitioner, who suffered from a very serious heart ailment, had deteriorated during trial to a point where he could not then

* References are to pages of the certified printed Record.

take the stand and testify in his own defense without endangering his life (R. 1134-1137; 1024-1026).

It was so certified in writings dated May 12, 1958 by Dr. William Wolins, the Chief of Medicine at the Central Suffolk Hospital, and by Dr. Louis A. Stein, who had been petitioner's physician for a number of years (Exhs. F1 and F2, R. 2204, 2205, 1136).*

When this application was made, the trial court made the following statement (R. 1145, 1146):

> "I noticed that both of the certificates say something very carefully. They don't say that it is dangerous for this man to continue to stand trial. They refer only to his capacity to testify as a witness. That is not the same thing. It may be arguable that one can not stand trial if he is told that it would endanger his life to testify. I don't know the answer to that question. I have no recollection of ever having seen that anyone has ever passed on it, as to whether the two things are one and the same. I would welcome anything that you can find in the authorities along those lines. Personally, I doubt if it is the same thing. * * *

---

* Dr. Wolins had been called in to treat petitioner on April 23, 1958 during the selection of the jury, because Glass had developed coronary pain which did not subside with the administration of drugs, and a motion for a mistrial and a severance had been made (R. 247) on April 24, 1958 based upon Dr. Wolins' report of this occurrence (Ex. F, R. 2202, 253) and upon documents and reports from five other physicians who had at various times prior to the trial either examined or treated petitioner (Exhs. A through E, R. 2184-2203; 248-253). Two of these (Exhs. A and B) were communications from doctors to other doctors during treatment in 1955 and 1956. That motion was denied (R. 268) as being without sufficient basis at that time, but the court asked to be advised promptly during the trial of anything which might be required to be done in order to preserve petitioner's health.

> "I wonder if it isn't necessary to find that he is actually psychotic before I am justified in granting the relief that you seek, and as I say, that is balanced by the necessity, if he should be so found, to do something about it."

The court stated that the question of whether petitioner could continue the strain "of standing trial" (R. 1144) was for medical experts to say; that the court would appoint physicians of its own choice to examine petitioner and report thereon; that the trial would be recessed for a sufficient length of time to permit whatever kind of examination such doctors would consider adequate and necessary (R. 1146-1150).

The court said that the best way to get the ablest physicians available, who would be completely impartial, would be for it to use for this purpose the court's medical report office, which in cooperation with the New York County Medical Association customarily furnishes upon request to the Supreme Court in New York City impartial medical advice (R. 1150-1151).

For this purpose the trial was recessed from Tuesday, May 13, 1958 until Monday, May 19, 1958 (R. 174, 1275).

The physicians thus selected by the court were Dr. A. Wilbur Duryee an eminent cardiologist, and Dr. Peter G. Denker, an eminent neuropsychiatrist. They were requested to report to the court as to whether or not court appearance and testifying would endanger petitioner's health; whether he suffers from a condition which he is able to feign or simulate; and if he is able to testify or appear in court, what safeguards should be taken.

The eight reports by the seven other physicians who had either attended or examined petitioner over a period of years which had theretofore been marked Exhibits A through F2 (see footnote p. 6 *supra*) were photostated and delivered to the two physicians for their study prior to their examination of petitioner (R. 1247-1249).*

Both physicians then gave petitioner a thorough examination which included an electrocardiogram.

Dr. Duryee thereafter reported back to the court (Court's Exhibit 2, R. 2213-2217, 1277) in pertinent part as follows:

> "I believe it would be dangerous for this man to testify in court and probably also dangerous for him to appear in court if he is put under emotional stress and strain. * * *
>
> "He suffers from a clear cut picture of coronary insufficiency which he has relatively no control over and he has no heart condition which he simulates or feigns."

---

* The past medical history of petitioner, who was 55 years old, as derived from the physicians who had attended him since February 1955 and from electrocardiograms made at various times during the three or four years preceding the trial, was as follows: he had had a heart attack in 1952 and a second attack in December 1954 when he was hospitalized for five weeks, and a third attack in February 1955 while he was still in the hospital recuperating from the attack of December 1954. As a result of the third attack he was hospitalized for six weeks and lost 70 pounds in weight.

All the physicians who had seen him agreed that there was unmistakable electrocardiographic evidence of these recurrent infarctions, that he had angina pectoris and atherosclerosis of the coronary arteries, and had been a semi-invalid since February 1955, suffering from episodes of acute coronary insufficiency which followed upon any nervous or emotional excitement, that he was a very tense, emotional person and that it was of the greatest importance for him to avoid any nervous or emotional excitement because such excitement would precipitate another episode (R. 104-106, 2184-2186, 2187, 2190, 2192-2194, 2199, 2202).

Dr. Denker's report to the court (Court's Ex. 2, R. 2218-2220, 1278) stated in pertinent part:

> "I do not feel this person is exaggerating or malingering his emotional disabilities. In view of the serious nature of his heart disease, as well as the emotional instability present on my examination, I feel it would be distinctly hazardous to his life if he were called upon to testify in the pending litigation. I do not feel this patient is malingering."

The court during the recess, without then disclosing to counsel the contents of these communications, transmitted a written message to the two physicians (Court's Ex. 4, R. 2221, Court's Ex. 5, R. 2224; 1278) in which it was stated that certain precautions were being taken (*i. e.*, sessions had been curtailed, starting at 10:30 A. M. on Mondays and at 10 A. M. on other days, recessing at noon, reconvening at 1:30 P. M., and recessing at 4 P. M. with a five to ten-minute recess midway in the afternoon session), and the following two additional questions were put to the physicians:

> "Will the taking of these precautions put the defendant in any more danger than he might anticipate should he continue with ordinary daily routine outside of court?
>
> "If Mr. Glass decides that he will take the stand and testify in his defense (which he is under no compulsion to do) instructions will be given to the attorney general to be as gentle as possible and there will be as many rest periods as may be asked for; would this impose any burden more onerous than that of merely sitting in the courtroom during the proceedings?"

To this inquiry Dr. Duryee replied (Court's Ex. 6, R. 2225, 1278) in pertinent part:

> "In answer to question one I feel definitely that the tensions of any courtroom procedure would in most cases place the defendant in more danger than the ordinary daily routing outside of the courtroom. This defendant is highly emotional and it would be my opinion that courtroom procedure would because of this affect his circulatory problem to a point where health and life would be endangered.
>
> "In answer to question two I am of the opinion that taking the stand and testifying would impose a greater burden on his circulation than merely sitting in a courtroom."

Dr. Denker replied to the court's supplementary questions (Court's Ex. 7, R. 2226, 1279) in pertinent part:

> "My response to the two questions asked of me would be 'yes' to both questions. I feel that despite the precautions taken, one could reasonably state that the defendant would be in greater danger of a heart attack under the circumstances mentioned, than in 'the ordinary daily routine outside of court'. Likewise taking the stand and testifying in his defense would impose a greater burden than that of merely sitting in the courtroom during the proceedings.
>
> "In amplification of the above, I again wish to point out that according to Dr. Duryee's cardiac opinion, that this patient is suffering from serious heart disease and could get another coronary episode at any time; all the more so when under emotional stress. This unquestionably, in my opinion,

would be a more likely hazard either when he is listening to testimony relevant to his trial situation, or when testifying himself. I do not feel this patient is malingering or exaggerating his symptoms. Lastly, I would like to point out to the Court the famous statement of Dr. John Hunter, the eminent British surgeon, who when suffering from angina pectoris, put his situation very neatly by stating, 'my life is at the mercy of any scoundrel who cares to excite me: I feel the situation in this case to be completely analogous."

On May 19, 1958 (the next court session) the court reported the entire correspondence to counsel, making it part of the record as Court's Exhibits 2 to 7 inclusive, but continued to reserve decision on the application for a severance and mistrial (R. 1279).

On May 20th, 1958 the motion was renewed (R. 1337, 1338) and at the conclusion of the prosecution's case on that day it was denied (R. 1420-2). Petitioner's counsel stated that he was foreclosed from putting in a defense because petitioner would not be able to testify in his own defense (R. 1519, fols. 4557-8).

On May 22nd, 1958 petitioner's counsel stated (R. 1527, fol. 4581) that he could not take the responsibility under the circumstances of calling the petitioner to testify, despite the fact that petitioner wanted to testify in his own defense, and had testified before the grand jury (R. 1530, fol. 4589).

On May 28th, 1958 the defendants rested, subject to petitioner's motion, which was renewed, and denied, for a severance and a mistrial (R. 206-207) upon the ground

that he was unable to proceed and could not proceed with the completion of the defense (R. 1781, 1787).*

On July 9, 1958 the reports of two more physicians selected by the trial court were made part of the record (Court's Exhs. 9 and 10, R. 2228-2237; 2072-2073). These were Dr. Irving Wright, a cardiologist, and Dr. Saul Heller, a neuropsychiatrist, who examined petitioner at the court's request from June 23 to June 27, 1958 at the New York Hospital, to determine whether imprisonment would endanger his life. Both physicians were informed of statements in petitoner's motor vehicle license applications in 1955 and 1957 which minimized the gravity of his condition at those times (R. 2229).

Dr. Wright's report to the court stated in pertinent part:

> "It is my opinion that incarceration of this man in a prison would very markedly endanger both his health and his life."

Dr. Heller's report to the court stated in pertinent part:

> "It is my opinion that this patient's life would be jeopardized if he were to be imprisoned."

* Petitioner applied to the Appellate Division of the Supreme Court for an order in the nature of prohibition to halt the trial which application did not come on to be argued before that court until May 29, 1958, by which time the trial testimony had been closed, and was not decided until June 2, 1958, by which time summations of counsel to the jury were in progress. That application was denied with an opinion (*Glass* v. *Markewich*, 6 App. Div. (2d) 793). (Appendix D, *infra*). Such an application could only have been granted under New York law if the trial court was acting or about to act without or in excess of jurisdiction, and if the regular processes of appeal would afford no protection to the applicant. *Matter of Brandenburg* v. *Court of General Sessions*, 189 Misc. 4, citing many decisions.

Petitioner renewed his motion for a severance and a mistrial, and moved to set aside the verdict, on the ground that his having been compelled to proceed with the trial in the physical condition in which he was, had violated his rights under the Federal and State Constitutions (R. 2073), and his right to a fair trial under the New York Code of Criminal Procedure and the motions were denied (R. 2074).

On November 26, 1958 petitioner was sentenced (R. 2139-2141, 242-244) on each of six of the substantive counts to pay a fine of $5000. (an aggregate of $30,000.), and to imprisonment from one year and six months to three years in a prison hospital, but execution of the sentence of imprisonment was suspended upon the following conditions (R. 2127, 2140, 243):

> 1. He is immediately to cease and refrain from active engagement in his business.
>
> 2. He is to conduct himself as he is advised by competent medical authority.
>
> 3. He is to surrender forthwith his driver's license for cancellation.
>
> 4. He is not to operate any powered vehicle including motor boats.
>
> 5. Within the limitations of medical advice he is to continue cooperating with the attorney general.

At the time of imposing this sentence the trial court stated (R. 2122-2124) as follows:

> "• • • But I am faced with the proposition that this is a very sick man. Court's Exhibits 9 and 10 in evidence, placed into the record after the conviction, are the reports of Doctor Wright and Doctor Heller,

and they indicate without doubt that to confine this defendant in prison might very well have extremely serious consequences. Now, although I am charged with the duty of pronouncing the ultimate judgment upon this defendant as far as the case is concerned, the law does not make me his executioner, and I have no intention of acting as such. I cannot fly in the face of these medical reports. I cannot send this man to prison and I will not send him to prison—let us understand that at the outset—because I am not going to be placed in the position of flouting the reports of competent medical men. * * *

"Now, I know that viewed as a cold proposition, to send him to prison and to direct that he be confined in the hospital in the prison sounds as if this would be the best way to look after him. I know that is not so, because psychologically it is untrue. There is that about confinement itself which would be dangerous to this man."

The Trial Court's Prejudicial Conduct and Remarks Published in the Local Press and Broadcast on Radio

An Extraordinary Term was convened by the Governor to investigate corruption in Suffolk County. For a period of more than two years prior to the trial, the State Commissioner of Investigation, and after him, a Special Prosecutor named by the Attorney-General, as well as a District Attorney appointed by the Governor, had investigated the County, and a number of indictments had eventuated. Various other aspects of the investigation had reached the courts in proceedings preliminary to the present trial.

This activity, quite naturally, was widely reported and commented upon in the local press and radio, and was made the subject of heated and partisan political debate in several political campaigns, including the campaign for District Attorney of Suffolk County. Feelings pro and con ran high, with respect to the activities of the defendant Britting, among others. After many years of service as Deputy County Treasurer, he had been elected to the Assembly. Accusations of "land grabs" were made in the press, accompanied by charges that the County had been defrauded out of great sums of money.

The feelings were heightened as the County, for many years, had been predominantly Republican in politics, while the Commissioner of Investigation, the Governor who appointed him, and the Special Prosecutor who succeeded to the conduct of the investigation of the County, and who indicted Britting, were prominent Democrats. Britting himself was a leading Republican, active in local politics. It was freely charged that political considerations were involved in the investigation. Regardless of the truth or falsity of such talk, it is beyond dispute that these matters were hotly debated, received wide publicity, and for a long time dominated thinking in the County.

Notwithstanding the strong emotional attention of the community and the presence of newspaper and radio reporters, the Trial Court, after the opening statements to the jury, did not admonish the jury against reading the newspapers and listening to radio reports of the case but, on the contrary, expressly sanctioned them, saying, "I am not going to be so unrealistic as to forbid you to read newspapers. That is utterly ridiculous" (R. 367). With

this unfortunate permission, the following events occurred which led to petitioner's motion for mistrial.

Despite the uncontradicted medical reports concerning petitioner's condition and the admitted belief of the Court, as indicated during the trial (R. 1526) and at the time of imposing sentence (R. 2122-2124), that the petitioner was a very sick man, on May 22 in open court, in the absence of the jury but in the presence of newspaper reporters (R. 1616), the Trial Court, without apparent reason whatever, voluntarily denounced the petitioner in such an intemperate and unjudicial manner as to reveal an overpowering bias and hostility (R. 1515-32). Without warning, the Court recorded its "observation" of petitioner's smoking a cigarette and driving a car (R. 1520). The Court professed "consternation", "amazement" and "outrage". He labelled petitioner's conduct as being in contempt of court and suggested that he should be committed (R. 1527, 1528). Remarking that observation "revealed that petitioner's car bore only one license plate", the comment was made, "the thought went swiftly across my mind that this is maybe part of the man's pattern that the rules and laws that apply to other people don't apply to him * * *" (R. 1517-18). The Court stated further, "In order to make assurance doubly sure", he peered out the window of his hotel room to conduct a surveillance of the parking lot (R. 1520). Meanwhile he gave some thought to "the danger that would be involved" in one with Glass' heart condition driving an automobile (R. 1521). A few minutes later another of his anonymous informants observed that petitioner had again been seen driving a car (R. 1521). This information "really moved" the Judge and he thought "it might be interesting

to observe what, if anything, he (Glass) had told the Bureau of Motor Vehicles about his condition" (R. 1521-22). So on May 21 he directed the Attorney General to get for him the records at the Motor Vehicle Bureau, "having no investigative facilities of my own" (R. 1523). After describing allegedly inconsistent statements concerning petitioner's health disclosed by the Court's *ex parte* investigation of his motor vehicle applications, the Court very frankly said, "which is true • • • I do not know" (R. 1525) and "I don't know what the explanation is and I don't care" (R. 1526). The Trial Court added that he had "a right to be outraged" because petitioner had urged his physical condition as a ground for mistrial (R. 1529). He thought it might have been "contemptuous" (R. 1527); this, in the face of the fact that doctors appointed by himself attested to the merit of the application. "I am concerned", said the Judge, "as a member of the community, if, being as sick as he says he is, he has a license and if he is as sick as he says he is, he is using it fraudulently • • • " (R. 1531). At the time of the denial of the motion for the mistrial, the Court saw fit to mention an additional bit of information, also acquired by him *ex parte* from an unnamed informant, that petitioner had been for a ride on a boat the "weekend before" (R. 1613). Again petitioner was berated—his actions, presumably referring to his motions for a mistrial, "verged on the contemptuous." Prior to May 22, all motions had been heard in chambers out of the presence of reporters. The Judge's own election to depart from his prior practice and, in this instance, to make his attack on petitioner in open court enabled the reporters to quote his remarks, as such, in the newspaper stories and over the radio. The Trial Court knew at the time that he made these remarks that

the press were in the courtroom (R. 1616) and he anticipated there might be publicity to the incident (R. 1614). The Court's remarks were, as expected, faithfully recorded and published in the Long Island Daily Press and in Newsday, the two daily newspapers widely read in Suffolk County where the trial was conducted, and published in a manner which could not have failed to reach the attention of the jurists. The Court, having previously sanctioned the reading by the jury of newspaper accounts of the trial (R. 367), made it inevitable that the offending items would come to their attention. The jurors were thus exposed to a newspaper report which stated that a Supreme Court Justice "tongue-lashed" petitioner for a half-hour, "accusing him of trifling with the Court about his ill health," and of being in contempt of court, and which recorded that the Court was outraged at the petitioner (Petitoner Glass' Ex. BB; R. 2206-07); to another newspaper article quoting the Judge as calling petitioner a "liar" and "one who seems to have a complete disregard for the law", and one who is fraudulently using his driver's license (Petitioner Glass' Ex. CC; R. 2208-10); and to radio broadcasts to the same effect (Petitioner Glass' Ex. DD; R. 2211-12). Upon a motion for a mistrial by petitioner, predicated on the fact that the publication of the Court's remarks made it impossible for petitioner to receive a fair trial, the Court denied the motion without any attempt to determine whether the jurists had read the articles or heard the radio broadcast and without any attempt to instruct them to disregard these articles and reports which undoubtedly came to their attention. Even when the Court came to charge the jury at the conclusion of the case, it never told them to ignore what they read or heard over the radio about the case.

Reasons for Granting the Writ

1. The New York Court of Appeals by its judgment of affirmance has decided federal constitutional questions of substance, viz. that a defendant's rights to due process and equal protection of the laws under the Fourteenth Amendment are not invaded by trying him over his objection at a time when his physical condition is such that he is unable to testify in his own defense without endangering his life; and that these rights are not invaded by such a trial, although the State Constitution and statute, without limitation, give every defendant the right to testify in his own defense.

In *People* v. *Hinksman*, 192 N. Y. 421, 431, the New York Court of Appeals said:

> "The law in this state governing the right of accused persons to testify in their own behalf is now contained in section 393 of the Code of Criminal Procedure which provides that 'The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him.' This section of the Criminal Code is identical in scope and effect with the statute of 1869, which remained in force until 1886, by which a person accused of crime was given the right to testify in his own behalf, and it will be observed that the privilege is conferred without limitation or qualification."

Equally without qualification or limitation is New York State Constitution, Art. 13, Sec. 4 (set forth *supra*, p. 4) which has been a part of the Constitution since 1874, that "any" person charged with offering a bribe, as was peti-

tioner, shall be permitted to testify in his own behalf in any criminal prosecution therefor.

The courts below have necessarily held that a fair trial may nevertheless be had without compliance with these provisions, if the defendant is too sick to be able to take advantage of them at the time without risk to his life.

Petitioner wanted to testify in his own defense (R. 1530), but two impartial specialists (Drs. Duryee and Denker) selected by the court had reported to the court that petitioner as of May 13, 1958 could not testify without endangering his life. Their statements were uncontradicted; they substantiated equally unequivocal statements to the same effect by Drs. Wolins and Stein; and they were corroborated by the findings of two more court-selected specialists (Drs. Wright and Heller) that imprisonment would also endanger petitioner's life. The doctors said that petitioner was not malingering; so did the trial judge (R. 266). The trial court's complete agreement as to the gravity of petitioner's illness can best be gauged from the unusual conditions which it put upon its suspension of a sentence of prisonment (p. 13, *supra*), commencing with the extraordinary provision that the petitioner was to refrain altogether from engaging in any business! Statements made in petitioner's motor vehicle operator's license applications in 1955 and 1957, which minimized the gravity of his condition at those times, were obviously incorrect, and were considered to be incorrect by the trial court, since the trial court required him to surrender such license for cancellation, stating that petitioner was too ill to have a license and had concealed from the Motor Vehicle Bureau the true nature of his illness (R. 2132).

Intent was an essential element of the crimes charged against petitioner (see Appendix C, *infra*), and it has long been the well established New York law of evidence that in such case a defendant may give testimony concerning his intent, and exclusion of such testimony has resulted in the reversal of convictions. *Kerrains* v. *People*, 60 N. Y. 221; *People* v. *Levan*, 295 N. Y. 26. Furthermore, the evidence against petitioner was circumstantial in nature (R. 1932). This made it more than usually important, therefore, that petitioner have an opportunity to present his explanation of the circumstances. Even without such explanation it took three days for the jury to reach a verdict.

The problem is therefore squarely presented by the facts of this case whether a fair trial includes the right of a defendant to testify in his own defense.

This Court in *Re Oliver*, 333 U. S. 257, 273, 275, in discussing the rights of one charged with contempt by a State one-man grand jury, said:

> "We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, *to offer testimony*, and to be represented by counsel. * * *
>
> "Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a

> reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, *and have a chance to testify* and call other witnesses in his behalf, either by way of defense or explanation." (Italics supplied)

The Court did not suggest, nor has it suggested in subsequent holdings, that the right of a defendant to testify is less basic in criminal prosecutions than in contempt cases; indeed, one would suppose, *a fortiori*, the converse to be true.

As was said in *Snyder* v. *Massachusetts*, 291 U. S. 97, 116, "A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, however convincing the ex parte showing."

This Court, commenting on the federal statute permitting a defendant to testify, said in *Wilson* v. *United State*, 149 U. S. 60, 65-66, that the common law prohibition against such testimony by the accused "in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he could readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. * * * In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established."

In *Eyer* v. *Brady*, 128 F. 2d 1012, 1014 (C. C. A. 4, 1942), cert. den. 317 U. S. 679, it was assumed, without deciding, that in the present state of the law in the United States a refusal to permit a defendant to testify under oath in a State prosecution would constitute a deprivation of due process under the Fourteenth Amendment justifying his release by a federal court on habeas corpus.

As stated in 58 Am. Jur., Witnesses § 173, "A constitutional provision conferring upon an accused the right to be heard in his own behalf is to be construed in its broadest sense in his favor. It * * * includes the right to take the stand as a witness, to be sworn and to testify".

In any event, the State having enacted a constitutional provision as well as a statute purportedly giving a right to all persons equally cannot administer and interpret them in such a fashion as to exclude the sick from their benefits without making that invidious and irrational distinction between the rights of the sick and those of the well, which was held in *Griffin* v. *Illinois*, 351 U. S. 12 to be a denial of equal protection and due process when made between the impoverished and those with money.

In *Griffin* v. *Illinois*, *supra*, it was held that although a State was not required by the Federal Constitution to provide a right to appellate review, nevertheless if it did, it could not do it in such a way as to deny review to those too poor to buy a stenographic transcript, without violating both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It was said that there was no distinction between such a law and one which would deny to those unable to pay court costs the "right to defend themselves in a trial court", and that "Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor." So also *Eskridge* v. *Washington State Board*, 357 U. S. 214.

One poor in health is not now given a fair trial if he is made to defend without the benefit of his own testimony,

when that right is accorded to the fortunate healthy. Such a trial is a mockery. *People* v. *Berling*, 115 Cal. App. 2d 255, 251 P. 2d 1017. It differs only in degree from trying a person while insane, which would violate the Fourteenth Amendment. *Massey* v. *Moore*, 348 U. S. 105, 108.

The trial court (p. 6, *supra*) expressed the view that one could properly be tried, assuming he was able "to stand trial", even though he was unable to testify because it would endanger his life. It commented on the fact that the certificates of Drs. Wolins and Stein did not say that petitioner could not stand trial, but only that he could not testify. Similarly the initial reports (see pp. 8-9, *supra*) rendered by Drs. Duryee and Denker, while stating unequivocally that it would be hazardous to his life for petitioner to testify, said only with regard to "standing trial" without testifying that that would be "probably also dangerous * * * if he is put under emotional stress and strain". And both, in their supplemental reports (pp. 10-11, *supra*) to the trial court emphasized the greater danger involved in testifying.

The rationale of the trial court's determination to continue the trial in the face of these uncontradicted reports was evidently that, so long as petitioner could understand the testimony against him and confer with counsel, it was inconsequential that the condition of his health would prevent him from making a defense by proffering his own testimony. The trial court believed, as it said (p. 6, *supra*), that nothing short of a finding that the petitioner was insane would necessitate a mistrial.

Since the Court of Appeals and the Appellate Division rendered no opinions in this case, their reasons for affirm-

ing the judgment cannot be determined. However in its opinion rendered in a collateral proceeding brought toward the close of the trial in which petitioner sought to prohibit the trial judge from proceeding further with the trial (see footnote p. 12, *supra*, and Appendix D, *infra*), the Appellate Division considered it relevant to comment that "No evidence was adduced that petitioner's condition would improve in the future."

This indicates a belief by that court that if a sick defendant does not demonstrate that he will be well enough to testify at some time in the future, he might as well be tried forthwith, despite his inability to defend himself, apparently on the principle that half a trial is better than none.

This notion was rejected by the Supreme Court of Mississippi in *Eastland* v. *State*, 223 Miss. 195, 78 So. (2d) 127. In that case four physicians certified that the defendant who suffered from heart disease could not undergo the ordeal of testifying in his own behalf without great risk and danger to his life. The trial court denied the application for a continuance, arguing that there was no indication that the accused would be any better at a later time. The Supreme Court of Mississippi, in reversing, held that whether or not the accused will be better able to undergo trial at a later date is not the test as to whether he is entitled to a continuance, any more than that would be the test in the case of an insane person. It held that in the circumstances, denial of a continuance deprived him of his constitutional rights, observing that while it was true that he was present at the trial "he may as well have been absent."

2. The prejudicial remarks of the Trial Court made in the presence of the local press as to collateral matters, inadmissible as evidence, with knowledge that his remarks would be published and likely to be read by the jury, deprived petitioner of a fair trial in violation of the XIV Amendment. This gratuitous, wholly unexpected and unnecessary denunciation is a startling revelation of the extent of the Court's bias against petitioner and is replete with intemperate statements, as well as admissions of conduct and mental operations unusual in a judge presiding at a criminal trial.

The trial was conducted at Riverhead, Long Island, in Suffolk County. Its two local newspapers, Newsday and Long Island Daily Press, were widely read and they had extensively covered the evidence with all the partisan feeling that such a situation engenders in a small community. Indeed, when the jury was empanelled, virtually all of the jurors admitted that they had read about the case, many of them specifically in the local newspapers, such as Newsday and Long Island Daily Press (Tr. of typewritten minutes, pages 1-900). Virtually all of them likewise had heard it discussed over the local radio. Of the twelve jurors finally selected, only the foreman stated he had not read about the case in the papers (537)* The remaining eleven jurors had read about it extensively (212, 262, 47, 767, 775, 55, 344, 369-370, 771, 777, 232, 383, 703, 715, 379, 550, 568).*

Faced with such conditions, the Trial Court, at the very least, should have instructed the jury not to read the newspaper reports nor listen to radio reports of the case. But, on the contrary, he stated (R 367):

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* From typewritten minutes.

> "I am not going to be so unrealistic as to forbid you to read newspapers. That is utterly ridiculous. I am relying upon your integrity and instructing you that whatever you may see or hear anywhere else by inadvertence or otherwise should, to use a very popular expression, roll right off your back and not have any impression upon you whatsoever."

In this regard, the Trial Court took his first erroneous step in failing to assure the petitioner of a fair trial. Such action on his part is to be contrasted and condemned by what the Court of Appeals in the District of Columbia said in *Coppedge v. United States*, 272 F. 2d 504 (1959) at page 507:

> "Under modern conditions juries are customarily permitted to separate, even over weekends, and, unless there be exceptional circumstances, they should be permitted to do so. Of course newspapers carry articles about public trials of sensational interest, and of course those accounts may, and frequently do, carry statements of facts totally outside the evidence being produced in the courtroom. Our newspapers have complete rights to publish such accounts and such additional facts. *But it is essential to a fair trial of a defendant that the jurors should not know the contents of, lest they take account of, such newspaper stories. In order to protect, so far as possible, this essential right of a defendant, we have required that trial courts call the attention of jurors specifically to the possibility of such newspaper accounts and to admonish jurors not to read them.* This has been the rule for the past twenty years, or longer, and this is at least the third time we have emphasized it. What is said here applies with equal force to radio news broadcasts or telecasts." (emphasis added)

In a local atmosphere of ferment where strong public feeling was fanned by extensive partisan publicity, the Trial Court's permission for the jury to read the newspapers about the case was an open invitation to read and be infected with matters which should not have come to their attention. Instead of taking the precautions needed under the circumstances to insure petitioner a fair and unbiased trial, this privilege to the jury succeeded in doing the reverse.

Having sanctioned the reading of newspaper accounts of the trial, it was more than ever the duty of the Trial Court to see that his own prejudicial opinions were kept from the jury through the media of the press and radio. He not only failed to do so, but what is more remarkable, he made his remarks with a full realization that he anticipated there might be publicity to the incident (R. 1614) and he knew the press were in the courtroom (R 1616). Under these circumstances, with the press in the courtroom, the reasonable likelihood that the jurors would read and hear his remarks was just as real as if the Trial Court's denunciation of the petitioner had been made to the jury directly.

When called to his attention by the motion for a mistrial, the Trial Court assumed that the jurors had read the articles and heard the radio, for he denied the motion simply on the ground that he had previously warned them not to be influenced, except by what they heard in the courtroom (R 1615).

In *People* v. *Murawski*, 394 Ill. 236, 68 N. E. 2d 272, 1946 and in Sollars v. State, 316 P. 2d 917 (Nev.), 1957, communications to the jury were inferred, where under circum-

stances, similar to the instant case, trials were conducted in small communities and it was reasonable to believe that the jurors read the newspaper publicity, which was prejudicial to the defendants' right to a fair trial. But in neither of these cases was it the conduct of the Trial Court which caused the publicity and which made it more grievous and damaging to the petitioner. Here, as in *Briggs* v. *United States*, 6C, 221 F. 2d 636, 1955 the unfavorable publicity was created by the Judge's own acts. Just as in *People* v. *Duncan*, 350 P. 2d 103 (Cal.), 1960, cert. granted by this Court 1075 Misc. on June 27, 1960, in *Shepherd* v. *State of Florida*, 341 U. S. 50, 70 S. Ct. 549, 95 L. Ed. 740, and in *Griffin* v. *United States*, 3C, 295 F. 437, the publications were caused by improper action of government officers. By virtue of the Judge's own conduct, petitioner was publicly stigmatized in the midst of the trial as one who in the Judge's opinion did not consider him bound by the laws that applied to other people, who was a fraud, who was trying to make a fool of the court, and who had reckless disregard for the rights of the other people in the community.

Moreover, the Trial Court did not make the slightest effort to determine whether the jurors read the articles and whether they may have become infected with the virus of bias from the articles and the radio broadcasts. Under similar circumstances, the Court of Appeals in *Briggs* v. *United States*, *supra*, impliedly placed such an obligation on the Trial Court when it said on page 639:

> "In the present case no attempt was made to ascertain whether any juror had read the articles."

The Circuit Court in *Briggs* v. *United States* furthermore brushed aside the contention made by the government

that there was no direct evidence in the case that the newspaper articles were read by any juror. The Court indicated that it was idle to say that there was no direct evidence to show that the jury read the articles when it was clear that they had appeared in leading journals and scattered broadcasts over the community. But what seemed to influence the Court greatly was the fact that it was the Judge himself who had created the publicity and that in his position his published opinion would have greater weight on the jury. Thus, the Court stated at p. 639:

> "Such juror could hardly fail to be impressed by this expression on the part of the judge of his opinion about the testimony favorable to appellant on the part of these two witnesses. It strongly suggested to such juror that such testimony was the result of improper conduct on the part of appellant, which, however, the evidence failed to show. As said by Chief Justice Hughes in *Quercia v. United States*, 289 U. S. 466, at page 470, 53 S. Ct. 698, at page 699, 77 L. Ed. 1321: 'The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be onesided'; that 'deductions and theories not warranted by the evidence should be studiously avoided'. This court has heretofore held that such publicity under similar circumstances was prejudicial to a defendant and necessitated a new trial."

Cf. *United States* v. *Powell*, 171 F. 2d 202 (D. C. Cal.), where the Trial Court granted a mistrial because the newspapers attributed to the Judge an opinion he gave on the admissibility of evidence which prejudiced the defendant, although there was no evidence that the jury had read it. Also, *Marshall* v. *United States*, 360 U. S. 310, 79 S. Ct. 1171.

Equally improper and prejudicial was the method by which the Trial Court conducted an *ex parte* investigation of petitioner Glass' conduct and, in the role of witness or acting, as a prosecuting attorney, adjudged the petitioner publicly to be guilty of lies, fraud, misrepresentation and unlawful conduct, without any opportunity for petitioner Glass to defend himself. Such an *ex parte* investigation by the Trial Court was condemned in *Gordon* v. *United States*, 6C, 178 F. 2d 896, 900-902. It required a reversal of the conviction in *People* v. *McGeoghegan*, 325 Ill. 337, 156 N. E. 378, 385, 1927. In *Williams* v. *People of the State of New York*, 337 U. S. 241, 69 S. Ct. 1079, this Court indicated that *ex parte* action on the part of a Trial Judge when applied to the trial procedure as distinguished from the procedure on sentence after conviction, might well constitute a violation of the due process clause under the 14th Amendment.

The affirmance of the conviction by the Court of Appeals of the State of New York is an approval of the actions of the Trial Court which amounted to a flagrant disregard of the fundamental concepts of a fair trial guaranteed by the 14th Amendment to the Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

LOUIS BENDER
MOSES KOVE
170 Broadway
Counsel for Petitioner

July 25, 1960.

APPENDIX A

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of April in the year of our Lord one thousand nine hundred and sixty, before the Judges of said Court.

Witness:

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur

April 28, 1960

THE PEOPLE &c.,
Respondent.

—vs.—

JOHN A. BRITTING and ALBERT G. GLASS,
Appellants.

BE IT REMEMBERED, That on the 17th day of March in the year of Our Lord one thousand nine hundred and sixty,

John A. Britting and Albert G. Glass, the appellants in this cause, came here into the Court of Appeals, by James D. C. Murray, and Wegman, Epstein & Burke, their respective attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgments of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Harris B. Steinberg, of counsel for the appellant Britting, and by Mr. Richard J. Burke, of counsel for the appellant Glass, and by Mr. Jérome C. Ditore, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are modified in accordance with the memorandum herein and, as so modified, affirmed.

> Memorandum: "The proof in this case sustains the judgment of conviction on one count against both defendants for the crime of conspiracy in violation of § 580, subd. 6, of the Penal Law. It also sustains the conviction of both defendants on nine counts for the crimes of giving and taking bribes in violation of §§ 1822 and 1823 of the Penal Law. However, on this record, the charges against the defendant Britting on nine counts of taking unlawful fees (Penal Law, § 1826) and on five counts for taking illegal fees (Penal Law § 855) were merged in the charges

of Bribery involving identical facts. In reality they amounted to duplicate convictions for the same offenses and, as such, they are reversed and the counts dismissed. As thus modified, the judgments of conviction should be affirmed."

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be modified &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 28, 1960.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

APPENDIX B

STATE OF NEW YORK

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the nineteenth day of May, A. D. 1960.

Present:

Hon. Charles S. Desmond,
Chief Judge, presiding.

No. 325.

The People &c.,

Respondent,

—vs.—

John A. Britting and Albert G. Glass,

Appellants

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant Albert G. Glass herein and papers having been submitted thereupon and due deliberation having been thereupon had:

Ordered, that the said motion be and the same hereby is granted. Return of the remittitur requested, and when

returned, it will be amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the denial of the motions of the defendant Glass made during trial for a mistrial and a severance upon the ground that he was then unable to testify in his own defense because of his physical condition violated his rights to due process of law and the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. This Court held that the rights of the defendant Glass under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

And the Supreme Court of Suffolk County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball
Deputy Clerk

(Seal)

APPENDIX C

Penal Law (McKinney's Consolidated Laws of New York, Book 39, Part 2) *Sec. 1822. Giving or offering bribes.*

> "A person who gives or offers a bribe to any executive officer, or to a person elected or appointed to become an executive officer, of this state with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in a state prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or by both."

Penal Law (McKinney's Consolidated Laws of New York, Book 39, Part 1) *Sec. 580. Definition and punishment of conspiracy.*

> "If two or more persons conspire: * * *
>
> 6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,
>
> Each of them is guilty of a misdemeanor."

APPENDIX D

In the Matter of Albert G. Glass, Petitioner, against Arthur Markewich, as Justice of the Supreme Court, et al., Respondents. Application, pursuant to article 78 of the Civil Practice Act, for an order prohibiting respondents from proceeding further with petitioner's trial in the Supreme Court, Suffolk County, Extraordinary Term, under an indictment accusing him of conspiracy and violation of section 1822 of the Penal Law, denied, without costs. No answer has been served by respondent Rigney, although he has submitted an affidavit and excerpts from the minutes of petitioner's trial in opposition to the application. A motion to dismiss has been made on behalf of respondent, Mr. Justice Markewich, pursuant to section 1293 of the Civil Practice Act, but no request has been made for permission to serve an answer, if the motion is denied. We assume therefore that it is the desire of the parties that a determination be made on the basis of the papers submitted. The petition states that the trial has now been proceeding since April 21, 1958, and that motions for a severance (a codefendant is also on trial) and for a mistrial have been made and denied. Petitioner has been informed by physicians whom he consulted that continuance of the trial would be dangerous to his health and life, and physicians consulted by the court have likewise reported that it would be dangerous for petitioner to testify in court and probably also dangerous for him to appear in court if he is put under emotional stress and strain. No evidence was adduced that petitioner's condition would improve in the future. The petition also states that petitioner has been advised by his attorney that it will

be necessary for him to testify, that he has a constitutional and statutory right to testify, and that he must now risk his life or risk the loss of a constitutional right by failure to be present in court to assist in and present his defense. On argument, however, we have been informed that the trial is now completed insofar as the introduction of evidence is concerned, and that petitioner has not been called to the stand. Apparently, in denying petitioner's motions, Mr. Justice Markewich was influenced to a considerable extent by activities on the part of petitioner which had come to his attention and statements theretofore made by petitioner which were inconsistent with his present claim, and with the history of his ailment which petitioner had presumably given to one of the physicians who reported his condition to the court. Apparently, also, such precautions as have been recommended for petitioner's safety, short of discontinuance of the trial, have been taken and will continue to be taken, and it now appears to be possible, in view of the present status of the trial, to take additional precautions (see *People* v. *La Barbera*, 274 N. Y. 339; *People* v. *Winship*, 309 N. Y. 311, 313, 314). Determination as to what course should be followed under the circumstances involves a grave responsibility, but the matter is one which rests at present at least within the discretion of the trial court. We are unable to say on the record presented that the court is acting or will act without or in excess of jurisdiction. Motion to dismiss petition denied, without costs. Present—Nolan, *P.J.*, Beldock, Ughetta, Hallinan and Kleinfeld, *JJ.*